

## SENATE BILL NO. 387

INTRODUCED BY K. BALES

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING LAWS RELATED TO THE BOARD OF ENVIRONMENTAL REVIEW; REVISING HEARING REQUEST PROCEDURES; REQUIRING A WRITTEN UNDERTAKING TO BE GIVEN BY A PARTY REQUESTING A HEARING OR A STAY; REQUIRING THAT THE BOARD ISSUE A FINAL DECISION WITHIN 120 DAYS UNDER THE AIR QUALITY LAWS AND THE MAJOR FACILITY SITING LAWS; MODIFYING THE EXPIRATION DATE REQUIREMENTS FOR A PERMIT OR LICENSE; CLARIFYING REMAND PROCEDURES; CLARIFYING THE USE OF BEST AVAILABLE CONTROL TECHNOLOGY REGULATIONS AND GUIDANCE; CLARIFYING COMMENCEMENT OF CONSTRUCTION REQUIREMENTS; AMENDING SECTIONS 2-4-623, 2-4-702, 75-2-211, AND 75-20-223, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

**Section 1.** Section 2-4-623, MCA, is amended to read:

**"2-4-623. Final orders -- notification -- availability.** (1) (a) A final decision or order adverse to a party in a contested case must be in writing. A final decision must include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, must be accompanied by a concise and explicit statement of the underlying facts supporting the findings. ~~A~~ Except as provided in 75-2-211 or 75-20-223, a final decision must be issued within 90 days after a contested case is considered to be submitted for a final decision unless, for good cause shown, the period is extended for an additional time not to exceed 30 days.

(b) If an agency intends to issue a final written decision in a contested case that grants or denies relief and the relief that is granted or denied differs materially from a final agency decision that was orally announced on the record, the agency may not issue the final written decision without first providing notice to the parties and an opportunity to be heard before the agency.

(2) Findings of fact must be based exclusively on the evidence and on matters officially noticed.

(3) Each conclusion of law must be supported by authority or by a reasoned opinion.

(4) If, in accordance with agency rules, a party submitted proposed findings of fact, the decision must include a ruling upon each proposed finding.

(5) Parties must be notified by mail of any decision or order. Upon request, a copy of the decision or order must be delivered or mailed in a timely manner to each party and to each party's attorney of record.

(6) Each agency shall index and make available for public inspection all final decisions and orders, including declaratory rulings under 2-4-501. An agency decision or order is not valid or effective against any person or party, and it may not be invoked by the agency for any purpose until it has been made available for public inspection as required in this section. This provision is not applicable in favor of any person or party who has actual knowledge of the decision or order or when a state statute or federal statute or regulation prohibits public disclosure of the contents of a decision or order."

**Section 2.** Section 2-4-702, MCA, is amended to read:

**"2-4-702. Initiating judicial review of contested cases.** (1) (a) ~~A~~ Except as provided in 75-2-211 or 75-20-223, a person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final written decision in a contested case is entitled to judicial review under this chapter. This section does not limit use of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by statute.

(b) A party who proceeds before an agency under the terms of a particular statute may not be precluded from questioning the validity of that statute on judicial review, but the party may not raise any other question not raised before the agency unless it is shown to the satisfaction of the court that there was good cause for failure to raise the question before the agency.

(2) (a) Except as provided in 75-2-211, 75-20-223, and subsection (2)(c) of this section, proceedings for review must be instituted by filing a petition in district court within 30 days after service of the final written decision of the agency or, if a rehearing is requested, within 30 days after the written decision is rendered. Except as otherwise provided by statute or subsection (2)(d), the petition must be filed in the district court for the county where the petitioner resides or has the petitioner's principal place of business or where the agency maintains its principal office. Copies of the petition must be promptly served upon the agency and all parties of record.

(b) The petition must include a concise statement of the facts upon which jurisdiction and venue are based, a statement of the manner in which the petitioner is aggrieved, and the ground or grounds specified in 2-4-704(2) upon which the petitioner contends to be entitled to relief. The petition must demand the relief to which the petitioner believes the petitioner is entitled, and the demand for relief may be in the alternative.

(c) If a petition for review is filed pursuant to 33-16-1012(2)(c), the workers' compensation court, rather

1 than the district court, has jurisdiction and the provisions of this part apply to the workers' compensation court in  
2 the same manner as the provisions of this part apply to the district court.

3 (d) If a petition for review is filed challenging a licensing or permitting decision made pursuant to Title  
4 75 or Title 82, the petition for review must be filed in the county where the facility is located or proposed to be  
5 located or where the action is proposed to occur.

6 (3) Unless otherwise provided by statute, the filing of the petition may not stay enforcement of the  
7 agency's decision. The agency may grant or the reviewing court may order a stay upon terms that it considers  
8 proper, following notice to the affected parties and an opportunity for hearing. A stay may be issued without notice  
9 only if the provisions of 27-19-315 through 27-19-317 are met.

10 (4) Within 30 days after the service of the petition or within further time allowed by the court, the agency  
11 shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under  
12 review. By stipulation of all parties to the review proceedings, the record may be shortened. A party unreasonably  
13 refusing to stipulate to limit the record may be required by the court to pay the additional costs. The court may  
14 require or permit subsequent corrections or additions to the record."

15  
16 **Section 3.** Section 75-2-211, MCA, is amended to read:

17 **"75-2-211. Permits for construction, installation, alteration, or use.** (1) The board shall by rule  
18 provide for the issuance, modification, suspension, revocation, and renewal of a permit issued under this part.

19 (2) (a) Except as provided in 75-1-208(4)(b), 75-2-234, and subsections (2)(b) and (2)(c) of this section,  
20 not later than 180 days before construction, installation, or alteration begins or as a condition of use of any  
21 machine, equipment, device, or facility that the board finds may directly or indirectly cause or contribute to air  
22 pollution or that is intended primarily to prevent or control the emission of air pollutants, the owner or operator  
23 shall file with the department the appropriate permit application on forms available from the department.

24 (b) Except as provided in subsection (2)(e), the owner or operator of an oil or gas well facility shall file  
25 the permit application with the department no later than January 3, 2006, or 60 days after the initial well  
26 completion date, whichever is later. For purposes of this section, the initial well completion date for an oil or gas  
27 well facility is:

28 (i) for an oil or gas well facility producing oil, the date when the first oil is produced through wellhead  
29 equipment into lease tanks from the ultimate producing interval after casing has been run; and

30 (ii) for an oil or gas well facility producing gas, the date when the oil or gas well facility is capable of

1 producing gas through wellhead equipment from the ultimate producing interval after casing has been run.

2 (c) An owner or operator who complies with subsection (2)(b) may construct, install, or use equipment  
3 necessary to complete or operate an oil or gas well facility without a permit until the department's decision on the  
4 application is final. If the owner or operator does not comply with subsection (2)(b), the owner or operator may  
5 not operate the oil or gas well facility and is liable for a violation of this section for every day of construction,  
6 installation, or operation of the facility.

7 (d) The board shall adopt rules establishing air emission control requirements applicable to an oil or gas  
8 well facility during the time from the initial well completion date until the department's decision on the application  
9 is final.

10 (e) The provisions of subsections (2)(b) and (2)(c) do not apply to an oil or gas well facility subject to the  
11 federal air permitting provisions of 42 U.S.C. 7475 or 7503.

12 (3) The permit program administered by the department pursuant to this section must include the  
13 following:

14 (a) requirements and procedures for permit applications, including standard application forms;

15 (b) requirements and procedures for submittal of information necessary to determine the location,  
16 quantity, and type of emissions;

17 (c) procedures for public notice and opportunity for comment or public hearing, as appropriate;

18 (d) procedures for providing notice and an opportunity for comment to contiguous states and federal  
19 agencies, as appropriate;

20 (e) requirements for inspection, monitoring, recordkeeping, and reporting;

21 (f) procedures for the transfer of permits;

22 (g) requirements and procedures for suspension, modification, and revocation of permits by the  
23 department;

24 (h) requirements and procedures for appropriate emission limitations and other requirements, including  
25 enforceable measures necessary to ensure compliance with those limitations and requirements;

26 (i) requirements and procedures for permit modification and amendment; and

27 (j) requirements and procedures for issuing a single permit authorizing emissions from similar operations  
28 at multiple temporary locations, which permit may include conditions necessary to ensure compliance with the  
29 requirements of this chapter at all authorized locations and a requirement that the owner or operator notify the  
30 department in advance of each change in location.

1 (4) This section does not restrict the board's authority to adopt regulations providing for a single air  
2 quality permit system.

3 (5) Department approval of an application to transfer a portable emission source from one location to  
4 another is exempt from the provisions of 75-1-201(1).

5 (6) The department may, for good cause shown, waive or shorten the time required for filing the  
6 appropriate applications.

7 (7) The department shall require that applications for permits be accompanied by any plans,  
8 specifications, and other information that it considers necessary.

9 (8) An application is not considered filed until the applicant has submitted all fees required under  
10 75-2-220 and all information and completed application forms required pursuant to subsections (2), (3), and (7)  
11 of this section. If the department fails to notify the applicant in writing within 30 days after the purported filing of  
12 an application that the application is incomplete and fails to list the reasons why the application is considered  
13 incomplete, the application is considered filed as of the date of the purported filing.

14 (9) (a) Except as provided in 75-1-205(4) and 75-1-208(4)(b), if an application for a permit requires the  
15 preparation of an environmental impact statement under the Montana Environmental Policy Act, Title 75, chapter  
16 1, parts 1 through 3, the department shall notify the applicant in writing of the approval or denial of the application:

17 (i) within 180 days after the department's receipt of a filed application, as provided in subsection (8), if  
18 the department prepares the environmental impact statement;

19 (ii) within 30 days after issuance of the final environmental impact statement by the lead agency if a state  
20 agency other than the department has been designated by the governor as lead agency for preparation of the  
21 environmental impact statement; or

22 (iii) if the application is for a machine, equipment, a device, or a facility at an operation that requires a  
23 permit under Title 82, chapter 4, part 1, 2, or 3, within 30 days of issuance of the final environmental impact  
24 statement in accordance with time requirements of Title 82, chapter 4, part 1, 2, or 3.

25 (b) If an application does not require the preparation of an environmental impact statement, is not subject  
26 to the provisions of 75-2-215, and is not subject to the federal air quality permitting provisions of 42 U.S.C. 7475,  
27 7503, or 7661, the department shall notify the applicant in writing within 60 days after its receipt of a filed  
28 application, as provided in subsection (8), of its approval or denial of the application, except as provided in  
29 subsection (14).

30 (c) If an application does not require the preparation of an environmental impact statement and is subject

1 to the federal air permitting provisions of 42 U.S.C. 7475, 7503, or 7661, the department shall notify the applicant,  
2 in writing, within 75 days after its receipt of a filed application, as provided in subsection (8), of its approval or  
3 denial of the application.

4 (d) Except as provided in subsection (9)(e), if an application does not require the preparation of an  
5 environmental impact statement and is subject to the provisions of 75-2-215, the department shall notify the  
6 applicant of its approval or denial of the application, in writing, within 75 days after its receipt of a filed application,  
7 as provided in subsection (8).

8 (e) If an application for a permit is for the construction, installation, alteration, or use of a source that is  
9 also required to obtain a license pursuant to 75-10-221 or a permit pursuant to 75-10-406, the department shall  
10 prepare a single environmental review document pursuant to Title 75, chapter 1, for the permit required under  
11 this section and the license or permit required under 75-10-221 or 75-10-406 and act on the applications within  
12 the time period provided for in 75-2-215(3)(e).

13 (f) The time for notification may be extended for 30 days by written agreement of the department and  
14 the applicant. Additional 30-day extensions may be granted by the department upon the request of the applicant.  
15 Notification of approval or denial may be served personally or by certified mail on the applicant or the applicant's  
16 agent.

17 (g) Failure by the department to act in a timely manner does not constitute approval or denial of the  
18 application. This does not limit or abridge the right of any person to seek available judicial remedies to require  
19 the department to act in a timely manner.

20 (10) (a) When the department approves or denies the application for a permit under this section, the  
21 applicant or a person who is jointly or severally adversely has provided the department with formal comments  
22 and who is directly and adversely affected by the department's decision may request a hearing before the board.  
23 The If the department provided an opportunity for public comment on the application, the request for a hearing  
24 by a party other than the applicant must be limited to those issues the party has raised in comments made to the  
25 department during the comment period and the request for a hearing must be filed within 15 days after the  
26 department renders its decision. An affidavit setting forth the grounds for the request must be filed within 30 days  
27 after the department renders its decision with the request for a hearing. The Except as provided in this section,  
28 the contested case provisions of the Montana Administrative Procedure Act, Title 2, chapter 4, part 6, apply to  
29 a hearing before the board under this subsection.

30 (b) (i) If a hearing is requested, the applicant or permittee may, within 15 days of its receipt of the request

1 for a hearing, elect to have the matter proceed to a hearing before the board or to have the matter submitted  
2 directly to the district court for judicial review of the agency decision. The applicant shall notify in writing the  
3 department and the person who requested the hearing of its election.

4 (ii) If the applicant or permittee has elected to have the matter submitted to the district court, the person  
5 who submitted the request for a hearing shall file a petition for review of the permit decision within 30 days of  
6 receipt of notice from the permittee.

7 (iii) The petition must be limited to matters raised in the request for a hearing and must be filed in the  
8 county in which the facility is located. If the applicant or permittee fails to make an election, the matter must  
9 proceed through the contested case process before the board pursuant to the Montana Administrative Procedure  
10 Act.

11 (iv) The board or the district court shall apply the laws and rules in effect when the application was filed,  
12 and the board or the district court may not consider any issue or evidence from a party other than the applicant  
13 or permittee that was not first presented to the department for the department's consideration during the formal  
14 comment period.

15 (c) If the person requesting the hearing is not the applicant or permittee, the board or the district court  
16 shall require a written undertaking to be given by the party requesting the hearing for the payment of costs and  
17 damages incurred by the permit applicant and its employees unless the board determines that issuance of the  
18 permit was prohibited by statute. When requiring an undertaking, the board or the district court shall use the same  
19 procedures and limitations as are provided in 27-19-306(2) through (4) for undertakings on injunctions.

20 (d) If grounds for requesting the hearing are based on alleged error in applying best available control  
21 technology requirements, the board or the district court shall give deference to the best available control  
22 technology determination made by the department. The board or the district court may not reject the best  
23 available control technology determination unless there is clear and convincing evidence that the determination  
24 is not in compliance with state or federal law that was in effect at the time the application was filed.

25 (11) (a) The department's decision on the application is not final until 15 days have elapsed from the date  
26 of the decision.

27 (b) The Subject to the provisions of subsection (13), the filing of a request for hearing does not stay the  
28 department's decision. However, the board may order a stay upon receipt of a petition and a finding, after notice  
29 and opportunity for hearing, that:

30 —— (i) the person requesting the stay is entitled to the relief demanded in the request for a hearing; or

1 ~~—— (ii) continuation of the permit during the appeal would produce great or irreparable injury to the person~~  
2 ~~requesting the stay.~~

3 ~~(c) Upon granting a stay, the board may require a written undertaking to be given by the party requesting~~  
4 ~~the stay for the payment of costs and damages incurred by the permit applicant and its employees if the board~~  
5 ~~determines that the permit was properly issued. When requiring an undertaking, the board shall use the same~~  
6 ~~procedures and limitations as are provided in 27-19-306(2) through (4) for undertakings on injunctions.~~

7 (12) The board shall issue a final decision within 120 days from the date that the board receives a request  
8 for a hearing unless the applicant or permittee agrees in writing to an extension of time.

9 (13) Any requirement in a permit to commence construction, installation, or alteration within a certain time  
10 period is tolled during a contested case or judicial review proceeding unless the applicant or permittee in its  
11 discretion waives the tolling in writing.

12 ~~(12)~~(14) The board shall provide, by rule, a period of 30 days in which the public may submit comments  
13 on draft air quality permits for applications that:

14 (a) are subject to the federal air quality permitting provisions of 42 U.S.C. 7475, 7503, or 7661;

15 (b) are subject to the requirements of 75-2-215; or

16 (c) require the preparation of an environmental impact statement.

17 ~~(13)~~(15) The board shall provide, by rule, a period of 15 days in which the public may submit comments  
18 on draft air quality permits not subject to subsection ~~(12)~~ (14).

19 ~~(14)~~(16) The board shall provide, by rule, the basis upon which the department may extend by 15 days:

20 (a) the period as provided in subsection ~~(13)~~ (15) in which the public may submit comments on draft air  
21 quality permits not subject to subsection ~~(12)~~ (14); and

22 (b) the period for notifying an applicant of its final decision on approval or denial of an application, as  
23 provided in subsection (9)(b).

24 ~~(15)~~(17) (a) The board may adopt rules for issuance, modification, suspension, revocation, renewal, or  
25 creation of:

26 (i) general permits covering multiple similar sources; or

27 (ii) other permits covering multiple similar sources.

28 (b) Rules adopted pursuant to subsection ~~(15)(a)~~ (17)(a) may provide for construction and operation  
29 under the permit upon authorization by the department or upon notice to the department.

30 (18) The department shall, for good cause shown, including an appeal of a permit or license under this



1 section, waive for up to 1 year any requirement that construction of a facility must proceed with due diligence. This  
2 waiver may be extended for good cause shown. During the period that a waiver is in effect, an air quality permit  
3 does not expire because construction of a facility failed to proceed with due diligence."

4  
5 **Section 4.** Section 75-20-223, MCA, is amended to read:

6 **"75-20-223. Board review of department decisions.** (1) (a) A person aggrieved by the final decision  
7 of the department on an application for a certificate or the issuance of an air or water quality decision, opinion,  
8 order, certification, or permit under this chapter may within 30 days appeal the decision to the board ~~under the~~  
9 ~~contested case procedures of Title 2, chapter 4, part 6.~~ Except as provided in this section, the contested case  
10 provisions of the Montana Administrative Procedure Act, Title 2, chapter 4, part 6, apply to a hearing before the  
11 board.

12 (b) If the department provided an opportunity for public comment on the application, the request for a  
13 hearing by a party other than the applicant must be limited to those issues the party has raised in comments  
14 made to the department during the comment period and the request for hearing must be filed within 15 days after  
15 the department renders its decision. An affidavit setting forth the grounds for the request must be filed with the  
16 request for a hearing.

17 (c) If a hearing is requested, the applicant or permittee may, within 15 days of receipt of the request for  
18 a hearing, elect to have the matter proceed to a hearing before the board or to have the matter submitted directly  
19 to the district court for judicial review of the agency decision. The applicant shall notify in writing the department  
20 and the person who requested the hearing of its election. If the applicant or permittee has elected to have the  
21 matter submitted to the district court, the person who submitted the request for a hearing shall file a petition for  
22 review of the permit decision within 30 days of receipt of notice from the permittee. The petition must be limited  
23 to matters raised in the request for hearing and must be filed in the county in which the facility is located. If the  
24 applicant or permittee fails to make an election, the matter must proceed through the contested case process  
25 before the board pursuant to the Montana Administrative Procedure Act. The board or the district court shall apply  
26 the laws and rules in effect when the application was filed, and the board or the district court may not consider  
27 any issue or evidence from a party other than the applicant or permittee that was not first presented to the  
28 department for the department's consideration during the formal comment period.

29 (2) A person aggrieved by the final decision of the department on an application for amendment of a  
30 certificate may within 15 days appeal the decision to the board ~~under the contested case procedures of Title 2;~~

~~chapter 4, part 6. as provided in subsections (1)(b) and (1)(c).~~

(3) A person aggrieved by the department's decision not to include an environmental impact statement or analysis in the department's findings pursuant to 75-20-216 may within 30 days appeal the decision to the board under the contested case procedures of Title 2, chapter 4, part 6. as provided in subsections (1)(b) and (1)(c).

(4) The board shall issue a final decision within 120 days from the date that the board receives a request for a hearing under this section unless the applicant agrees in writing to an extension of time.

~~(4)(5)~~ A customer fiscal impact analysis required by 69-2-216 may not be used as the basis of an appeal of a final decision by the department."

NEW SECTION. Section 5. Severability. If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. Section 6. Effective date. [This act] is effective on passage and approval.

NEW SECTION. Section 7. Applicability. Except as provided in 75-2-211(18), [this act] applies to judicial and board of environmental review hearing and appeal proceedings initiated on or after [the effective date of this act].

- END -